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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KEITH THOMAS,

Petitioner,

vs.

UNITED STATES DISTRICT COURT; et
al.,

Respondents.

CASE NO. 10-CV-2572 BEN (POR)

ORDER DISMISSING PETITION
FOR WRIT OF MANDAMUS AND
DENYING IN FORMA PAUPERIS
APPLICATION AS MOOT

On December 6, 2010, Petitioner Keith Thomas, a state prisoner proceeding pro se, filed a Petition for Writ of Mandamus ("Petition") and Application to Proceed In Forma Pauperis. (Docket Nos. 1, 2.) For the reasons set forth below, the Petition is dismissed sua sponte and the Application is denied as moot.

I. BACKGROUND

The Petition seeks review of a order signed by Judge Whelan of this Court, which dismissed Petitioner's Second Amended Complaint and denied leave to amend. (Pet., Ex. E.) According to the Petition, the Second Amended Complaint stated claims under 28 U.S.C. § 1983 for, among other things, denial of medical treatment consisting of: (1) the use of marijuana in prison pursuant to a medicinal marijuana card; (2) physical therapy for arthritis; (3) "dental implant;" (4) "tattoo removal;" (5) "sinus treatment;" and (6) "right hand reconstruction." (Pet., 2.) On April 13, 2010, Judge Whelan signed an order ("Order") that sua sponte dismissed the Second Amended Complaint for

1 failure to state a claim and denied leave to amend on the grounds that amendment would be “futile at
2 this time.” (Pet., Ex. E.)

3 Petitioner appealed. (*Thomas v. United States Drug Enforcement Administration*, Case No.
4 09-cv-2916 W, Docket No. 21.) On June 15, 2010, the Ninth Circuit issued an order stating “[b]ecause
5 the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed.”
6 (*Id.*, Docket No. 22.)

7 Petitioner then filed the Petition currently before this Court.

8 **II. SUA SPONTE SCREENING**

9 A complaint may be dismissed sua sponte before service of process if it is frivolous, malicious,
10 fails to state a claim, or seeks damages from which defendants are immune. 28 U.S.C. § 1915A. An
11 action is frivolous “where it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490
12 U.S. 319, 325 (1989). Here, Petitioner invokes jurisdiction under the All Writs Act, 28 U.S.C. §
13 1651(a), but asks this Court to compel, or issue mandamus to, Judge Whelan to (1) reopen Case No.
14 09-cv-2916; (2) “remand the case to trial;” and (3) “give summary judgment in favor” of Petitioner.
15 (Pet., 6.)

16 Section 1651(a) of title 28 of the United States Code codifies the common-law writ of
17 mandamus. Specifically, Section 1651(c) provides that “[t]he Supreme Court and all courts
18 established by Act of Congress may issue all writs necessary or appropriate in aid of their respective
19 jurisdictions and agreeable to the usages and principles of law.” However, this is a “drastic and
20 extraordinary” remedy “reserved for really extraordinary causes.” *Cheney v. U.S. Dist. Court for the*
21 *Dist. of Columbia*, 542 U.S. 367, 379-80 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260
22 (1947)). Additionally, the plain language of Section 1651 shows that this writ relief may be invoked
23 in a district court only as an aid to already existing jurisdiction. 28 U.S.C. § 1651(a). Here, however,
24 this Court does not have jurisdiction to review or compel the performance of Judge Whelan in the
25 related case, Case No. 09-cv-2916. See generally *United States v. Park Place Assoc., Ltd.*, 563 F.3d
26 907, 924-25 (9th Cir. 2009). Thus, a petition for mandamus to compel Judge Whelan to take certain
27 action in Case No. 09-cv-2916 is frivolous as a matter of law. The Petition is dismissed accordingly.
28

1 **III. IN FORMA PAUPERIS APPLICATION**

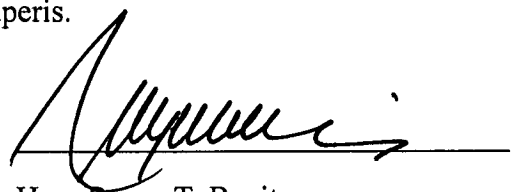
2 In light of the above, Petitioner's Application to Proceed In Forma Pauperis is denied as moot.

3 **IV. CONCLUSION**

4 For the reasons set forth above, the Court hereby DISMISSES this action sua sponte as
5 frivolous and without leave to amend, pursuant to 28 U.S.C. § 1915A(b)(1). Additionally, the Court
6 DENIES Petitioner's Application to Proceed In Forma Pauperis.

7 **IT IS SO ORDERED.**

8 Date: 12/29/2010


Hon. Roger T. Benitez
United States District Court Judge